



Comments by Centre of Applied Legal Studies

to

**The Intergovernmental Working Group on the Elaboration of a Binding
Instrument on Business and Human Rights (“Working Group”)**

regarding

**The Elements for the Draft Legally Binding Instruments on Transnational
Corporations and Other Business Enterprises with Respect to Human
Rights**

28 February 2018

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A INTRODUCTION

1. *About the Centre for Applied Legal Studies*

- 1.1. The Centre for Applied Legal Studies (“CALS”) welcomes the opportunity to comment to the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (“IGWG”) with regards to the elements for purposes of a draft treaty for transnational corporations.
- 1.2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand, South Africa. Its vision is a socially and economically just country where human rights are promoted, respected, protected and fulfilled by the state, corporations, individuals and other repositories of power.
- 1.3. CALS seeks to actualise its vision by challenging the structural nature of poverty and inequality, the global dynamics that sustain it and the repositories of power that perpetuate it.

B. OVERVIEW

2. CALS welcomes the opportunity to submit these comments on the elements for the elaboration of a legally binding treaty. We will make our submissions in terms of headings as they appear in the elements document and make some general observations about the process.

C HEADINGS WE ARE SUBMITTING COMMENTS

3. *Jurisdiction*

The section on jurisdiction should expound more clearly on the complexities of holding subsidiaries and their holding companies accountable and liable jointly and severally for human rights violations. The complicated involvement of different states that are involved and implicated in relationships between parent companies and their subsidiaries also requires more clarity and elaboration.

4. *Accountability and Responsibility for Promotion and Protection of Human Rights*

The elements give a wide overview of state obligations, however these obligations should include a responsibility on the state as part of its oversight role on the activities of corporations in their jurisdiction to suspend such activities where human rights violations have been found and demand immediate redress. In the event that a corporation fails to provide for redress when suspended by the state to remedy human rights violations, states shall be entitled and in grave case obliged to terminate the operations of the corporation.

We find the elements to be deficient in creating direct liability for corporations. The elements emphasise the obligations of the state without doing the same for the obligations of Transnational Corporations. This seems to be a recurring theme within the document including under the section on legal liability.

Prof David Blitchitz, the director for South African Institute for Advanced Constitutional Public, Human Rights and International Law a research centre of the University of Johannesburg, in his submissions to the HRC working group focused on possible approaches a treaty on business and human rights could adopt, in apportioning obligations to promote or protect individuals against the violation of their rights by third parties such as corporations.¹ He considered both holding transnational corporations directly and indirectly through states for purposes of such a treaty. CALS endorses his recommendations for a direct approach model to be considered for the envisaged treaty.

¹ South African Institute for Advanced Constitutional Public, Human Rights and International Law (SAFAIC), 'What Provisions Should a Treaty on Business and Human Rights Contain Governing Corporate Obligations?' <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/DavidBilchitz_Determining_Nature_Extent_Corporate_Obligations.docx> accessed 28 February 2018.

5. Responsibility of TNCs and OBS

It is common cause that many states fail to enforce human rights obligations with regard to corporate activities as a result of power imbalances in relation to corporations rendering them too weak to act. In other cases however the failure to act can be attributed to states being in collusion with corporations. We thus submit that the elements are not only deficient but self-defeating in regulating corporate conduct by placing direct positive obligations on the states only. The very essence of this treaty is to hold transnational corporation accountable in the manner in which they conduct their business.

The treaty should incorporate both positive and negative obligations for the respect and promotion of human rights in relations to business conducts of TNCs and OBEs.

The draft treaty should also create an obligation on the part of corporation to conduct environmental and human rights assessment prior to the commencement of the activities. Such assessment must also be reviewed in the duration of the operation of the corporation and readjustments to corporate activities must be conducted in the event that there are new developments that show adverse consequences of their activities after they have commenced their operation and initial assessments are concluded. This is an obligation in terms of the elements mentioned under state obligations which should equally apply to corporations.

An obligation must also be placed on corporation in terms of 3.2 of the responsibilities of corporations and demand that they not only refrain from activities that undermine the rule of law as well as governmental and other effort to promote and respect human rights, to include the **protection** of human rights. The language should read promote, **protect** and respect human rights

6. Obligations of International Organisations

We note that this section does not actually speak to the obligations of international organisations but rather obligations of the state which is misleading. The duty must impose direct obligations on international obligations to protect, respect and promote

human rights. In practice this should cover obligations amongst others, institutions such as the IFC which is the lending arm of the World Bank, the BRICS Bank, Organisation for Economic Co-operation and Development etc, to ensure the promotion, respect and protection of humans in development projects of corporations they invest in.

In this regard we would implore the working group to consider submissions made by the Legal Resources Centre, advocating for a baseline principle in ensuring the realisation of both the substantive and procedural aspects of the Right to Development, with the requirement of the Free, Prior and Informed Consent of affected communities as a requirement for development projects be included.²

7. Preventative Measures

CALS submits that states should not approve TNC activities where consultation or consent has not been obtained from relevant state holders, including communities that will be affected by the conduct of corporations. It should be impressed on states to be mindful of this obligation particularly when dealing with marginalised and vulnerable communities.

It is insufficient to only require states to provide TNCs and OBEs with information about obligations contained in the instrument, TNCs and OBEs also need to be obliged to appraise themselves through due diligence procedures with the relevant information on legal obligations that are binding upon them.

8. Legal Liability

The elements are of course skeletal and in the event that parties agree to a treaty that is as thin, there may be some difficulties in expanding on the draft treaty to create obligations on various industries and issues such as gender. The minimalist

² http://lrc.org.za/art_external/pdf/2016_10_26_LRC_Submission_to_IGWG_for_2nd_Session.pdf (accessed on 28 February 2018).

approach limits the expansion of such a draft treaty to incorporate the specifics of the treaty and must be clearly articulated.

9. Mechanisms for promotion, implantation and monitoring

CALS is pleased with the options provided for in relation to a mechanism for the enforcement of the treaty. We note with concern however that access to justice and remedy is mostly focussed on the domestic sphere which in many cases fails affected communities and individuals. We would thus push for robust consideration of the Judicial Mechanism as proposed which provides access to remedies under the various mechanisms by both communities and individuals. This is imperative given the need of victims of human rights violations for direct access to justice in the event that states are unwilling and unable to act, which. CALS would submit such access is one of the core reasons behind the envisaged treaty and should be made explicit in the draft treaty.

10. Gender Lens

As they stand, the elements are silent on the incorporation of instruments that centre gender in human rights issues. We propose that by the time the elements are converted into a draft, they are infused with a woman's rights based perspectives. We refer to submissions already made by CALS where it advocated for a gendered lens to both the process for the elaboration of the binding instrument and the content of the binding instrument.³ We also called for poverty to be a consideration in both the process and the content of the binding instrument. In summary, our submissions enjoined the working group to utilise the treaty process as an opportunity to address the multifaceted and intersectional human rights impacts of corporate activities.

D. GENERAL OBSERVATIONS ON THE PROCESS

³ CALS, 'Submission by the Centre for Applied Legal Studies to The Intergovernmental Working Group on the Elaboration of a Binding Instrument on Business and Human Rights regarding The Content of the Binding Instrument' (June 2015) <www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/bhr/resources/CALS%20Submission%20on%20Binding%20Instrument%20on%20Business%20and%20Human%20Rights%20June%202015.pdf> accessed 28 February 2018.

Although CALS is grateful for this opportunity to submit these comments, we are also concerned of the manner in which the elements were developed. Until there were draft elements produced in September/October 2017 our understanding was that leading to the third session stakeholders in the process will be finished with the draft of the treaty itself rather than elements to further elaborate on it.

The manner in which the elements were drafted also made it difficult for us as proponents of the treaty process to contribute meaningfully to the process as it was no longer what we had envisaged.

Although we understand that at this stage it is the elements that we have to work with, we hope that the processes leading up to the fourth session could be much clearer and the next steps following the contribution to the elements is properly outlined.

It is our hope and understanding the following the contributions made on the elements a draft of the treaty will be circulate in advance of the fourth session as we hope to also give input.